

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GEORGE RUSSELL PEAVY, Deceased)
Claimant)
)
VS.)
)
PRICE BROTHERS EQUIPMENT, INC.)
Respondent)
)
AND)
)
ZURICH AMERICAN INS. CO.)
Insurance Carrier)

Docket No. 1,034,431

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the September 28, 2009, Award and the October 1, 2009, Nunc Pro Tunc Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on January 13, 2010. Mitchell W. Rice, of Hutchinson, Kansas, appeared for the dependents of George Russell Peavy (decedent). Ryan D. Weltz, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that decedent's death was a direct and natural result of his work-related accident and that his widow and surviving minor child are entitled to death benefits. The ALJ further found that respondent was entitled to a credit for the \$125,000 it previously paid decedent in temporary total disability benefits.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent contends that it was not proven that decedent's death was a direct and natural result of his work-related accident. In the event the Board finds that decedent's death was a direct and natural result of his work-related accident, respondent asserts that death benefits for his dependents are not recoverable under the Workers Compensation

Act because his death did not occur within five years of the precipitating injury. Last, if the Board finds that decedent's death was a direct and natural result of his work-related accident and death benefits are recoverable, respondent requests the Board determine whether it is entitled to a credit against the death benefits for disability compensation paid to decedent before his death.

Decedent's dependents assert they are entitled to death benefits, contending that the only medical testimony is to the effect that decedent's death was a direct and natural result of his work-related injury. Further, they contend they are entitled to death benefits notwithstanding that decedent died more than five years after his work-related accident, arguing that to read K.S.A. 44-520a as a statute of limitation rather than a statute dealing with written notice is a violation of their constitutional right to equal protection. Decedent's dependents further argue that respondent is not entitled to a credit for temporary total disability benefits previously paid, and the ALJ erred in allowing a credit of \$125,000 against the \$250,000 death benefit.¹

The issues for the Board's review are:

(1) Are death benefits recoverable under the Workers Compensation Act when the injured worker's death did not occur within five years of the precipitating injury?

(2) Was decedent's death a direct and natural result of his work-related accident?

(3) If decedent's death was a direct and natural result of his work-related accident and death benefits are recoverable by his dependants, is respondent entitled to a credit against the death benefits for workers compensation benefits paid to decedent before his death?²

FINDINGS OF FACT

On March 15, 2000, decedent was injured on the job while working for respondent as a heavy equipment mechanic. As a result of his injury, decedent received extensive medical treatment, including amputation of his right leg above the knee. In the past few years, he had been in a nursing facility. He died on September 9, 2008, leaving as survivors his wife, Karen Peavy, and two children. One child, Cody, whose date of birth was December 15, 1993, was a minor at the time of decedent's death.

¹ At the time of claimant's precipitating injury, March 15, 2000, the amount of the death benefit was \$200,000, not \$250,000 as was awarded by the ALJ. During oral argument, the parties agreed that the death benefit was \$200,000 on claimant's date of accident. The parties further agreed the date of accident and not the date of death controls what version of the statute applies to this claim.

² See *Thompson v. Renzenberger, Inc.*, Docket No. 1,025,518, 2009 WL 3710734 (Kan. WCAB October 16, 2009).

Dr. Bamidele Adeagbo, the deputy coroner of Sedgwick County, performed an autopsy on the decedent. After conducting the autopsy, Dr. Adeagbo opined that decedent died as a result of acute pulmonary thromboemboli, with contributory factors including atherosclerotic cardiovascular disease, morbid obesity, and an above-the-right knee amputation. He deemed the manner of death to be an accident, specifically the work-related accident that resulted in claimant's leg amputation.

Dr. Adeagbo testified that on the date of decedent's death, he developed shortness of breath. He was sent to the hospital, where a leak was noted in his peripherally inserted central catheter (PICC) line. Decedent was returned back to the nursing home after failed attempts to fix the PICC line. Within an hour of returning to the nursing home, decedent died of a pulmonary embolism.

Dr. Adeagbo testified that decedent's amputated leg and inability to walk or exercise, confinement to a nursing facility, and weight gain contributed to the pulmonary embolism that caused his death. He said that decedent's weight gain could have occurred because he was not active or mobile enough to exercise because of his amputated leg, but he admitted he did not know decedent's weight at the time of the work-related accident. He said the repeated insertion of a PICC line could have also contributed to the pulmonary embolism. Dr. Adeagbo testified that he believed decedent's pulmonary embolism was the result of the cumulative effect of all those factors.

Dr. Adeagbo said that had decedent's accident and its sequelae not occurred, it was possible that he would still be alive. However, Dr. Adeagbo also said that the literature states that of the people who suffer from pulmonary embolism, 20 percent have no risk factors.

Dr. Adeagbo admitted that the autopsy on decedent's body was made more difficult because the body had been embalmed before the autopsy. He, therefore, could not conclude whether decedent's pulmonary embolism occurred just prior to his death or had been in existence for awhile. He said the pulmonary embolism was an acute event which probably occurred with 72 hours of decedent's death.

PRINCIPLES OF LAW AND ANALYSIS

Are death benefits recoverable under the Workers Compensation Act when the injured worker's death did not occur within five years of the precipitating injury?

K.S.A. 44-520a(a) states:

(a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified

mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

In *Forcade*,³ the Kansas Supreme Court interpreted G.S. 1949, 44-520a and stated:

The provision of the new act . . . refers to the three years within which death must occur before any liability accrues under the Act. With this interpretation the legislative intent appears that death from an accidental injury must ensue within three years from the date of the injury, G.S.1949, 44-535, and if death does occur within such time, the claim for compensation for such death must be filed within eight months thereafter.

In *Brooks*,⁴ the Kansas Supreme Court held:

In a workmen's compensation case where a workman sustained a compensable injury by accident and died as a result thereof three years, five months and twelve days after the date of the accident and the legal guardian of his minor children sought compensation therefor, the record is examined, and it is held: (1) G.S.1949, 44-520a requires that before compensation can be allowed, the death of a workman must have occurred within three years from the date of the accident; this limitation is not affected by the provisions of G.S.1949, 44-509; and (2) the trial court did not err in its judgment denying compensation.

In *Tapp*,⁵ the Board held: "Based upon the Kansas Supreme Court decisions cited above [*Forcade* and *Brooks*], the Board concludes death benefits are not due when a worker's death occurs more than five years after his or her work-related accident."

When K.S.A. 44-520a was amended by the Legislature to extend the time from three years to five years, the *Forcade* decision had been issued. If the Legislature had intended a different interpretation, it would have clarified the statute. It did not nor has it since.

Claimant contends and the ALJ determined that the Legislature most likely intended the five-year limitation in K.S.A. 44-520a(a) to mean that a written claim for compensation must be filed within one year after the death of the injured worker and, as such, is a statute

³ *Forcade v. List & Clark Constr. Co.*, 172 Kan. 119, 122, 238 P.2d 549 (1951).

⁴ *Brooks v. Kansas Power & Light Co.*, 182 Kan. 177, Syl., 318 P.2d 1036 (1957).

⁵ *Tapp v. Ferrell Construction Company*, Docket No. 198,699, 2005 WL 1983387 (Kan. WCAB July 13, 2005), *aff'd* in unpublished Kansas Court of Appeals decision, Case No. 95,004, 139 P.3d 787 (2006).

of limitations for the timeliness of commencing the claim and not a bar where a claim was timely made. However, our Kansas appellate courts have interpreted this statute to mean that in order for the death to be compensable, the death must have occurred within five years of the accident. The Board is bound by the doctrine of *stare decisis* to follow this precedent from the higher courts. The Board notes but does not rule on claimant's constitutional issue of denial of equal protection.

Based on the above ruling, the remaining issues in this appeal are moot.

CONCLUSION

Death benefits are not recoverable for the deceased claimant's dependents in this case because his death did not occur within five years of the precipitating injury.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the September 28, 2009, Award and the October 1, 2009, Nunc Pro Tunc Award of Administrative Law Judge John D. Clark dated, are reversed.

IT IS SO ORDERED.

Dated this _____ day of January, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Ryan D. Weltz, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge